SUBJECT INDEX

	Page
Questions presented	1
Statement	2
Respondents' proposed business	2
Pertinent provisions of the Act	3
Reasons for denying the writ of certiorari	4
1. The decision of the California Supreme Court was founded upon an adequate and independent state ground	4
2. The Act abridges freedom of speech and press; the judgment below is in accordance with the applicable decisions of this Court	7
(a) The Act does not protect the public interest against a clear and present danger	7
(1) It is not likely the alleged "evils" will occur	8
(2) The occurrence of the alleged "evils" is not imminent	9
(b) The Act imposes an overly broad ban on a medium of communication	10
(c) The Act bears a strong presumption against its validity	11
(d) The Act prohibits the dissemination of speech and entertainment by prohibiting charging for viewing television programs	11
(e) The First Amendment protects enterprises engaged in disseminating information irrespective of whether they are conducted for profit	13
3. The Act violates the equal protection clause	13
Conclusion	15

TABLE OF AUTHORITIES CITED

Cases — Page

American Broadcasting Co. v. United States, 110 F. Supp. 374, aff'd, 347 U.S. 284 7

Associated Press v. United States, 326 U.S. 1 11

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 11

Bridges v. California, 314 U.S. 252 8

Burstyn v. Wilson, 343 U.S. 495 13

City of New York v. Central Savings Bank, 306 U.S. 661 4

Connecticut Committee Against Pay TV v. F.C.C., 301 F. 2d 835, cert. denied 371 U.S. 816 9

Fox Film Corp. v. Muller, 296 U.S. 207 4

Grosjean v. American Press Co., 297 U.S. 233 12

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 ..... 4, 5

Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194 4

Morey v. Doud, 354 U.S. 457 ..... 13, 15

Near v. Minnesota, 283 U.S. 697 12

New York Times v. Sullivan, 376 U.S. 254 13

Rumely v. United States, 197 F. 2d 166 7

Saia v. New York, 334 U.S. 558 ..... 10, 13

Schenck v. United States, 249 U.S. 47 8

Schneider v. Town of Irvington, 308 U.S. 147 12

Shelton v. Tucker, 364 U.S. 479 10

Thomas v. Collins, 323 U.S. 516 8

United States v. C.I.O., 335 U.S. 106 11

Weaver v. Jordan, 64 Adv. Cal. 243, 411 P. 2d 289 ..... 2, 6

West Virginia State Board of Education v. Barnette, 319 U.S. 624 8

Statutes Page

California Constitution, Art. I, Sec. 9 .....1, 5, 6

Free Television Act, Sec. 2 .....9, 13

Free Television Act, Sec. 3 .....3, 14

Free Television Act, Sec. 4 .....3, 14

United States Constitution, First Amendment 2, 7, 11, 12, 13

United States Constitution, Fourteenth Amendment 2, 7, 13

Miscellaneous

Report of the Assembly Interim Committee on Public Utilities and Corporations Relative to Pay Television; Assembly Interim Committee Reports 1959-1961 8

Report on Hearings on Subscription Television, House Committee on Interstate and Foreign Commerce (1958) 9, 14

IN THE

Supreme Court of the United States

October Term, 1966
No. 188

FRANK M. JORDAN, etc.

Petitioner,

vs.

S. L. WEAVER, *et al.*,

Respondents.

Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Respondents file this brief in opposition to the Petition for a Writ of Certiorari seeking review of the California Supreme Court's determination that the "Free Television Act" (the "Act") violates the free speech and free press provisions of both the United States and California constitutions. The Act purports to prohibit the conduct of all subscription television businesses in California.

Questions Presented.

1. Did the California Supreme Court base its decision that the Act is unconstitutional on an adequate and independent state ground (*i.e.*, Article I, §9 of the California Constitution)?

2. Does the Act violate the rights of free speech and free press of the First Amendment as incorporated in the Fourteenth Amendment to the Constitution?

3. Does the Act violate the equal protection clause of the Fourteenth Amendment?[1]

Statement.

Respondents seek to conduct a subscription television business in California. In December 1964 respondents submitted articles of incorporation to petitioner for the purpose of creating a corporation to conduct their proposed subscription television business. Petitioner declined to file the articles on the ground that subscription television businesses in California were unlawful under the provisions of the Act.

Respondents commenced this action to obtain a judicial declaration that the Act is unconstitutional under *both* the federal and state constitutions and consequently that subscription television businesses may be conducted in California.

Respondents' Proposed Business.

Respondents' proposed business includes the establishment of a "closed circuit" subscription television system for the dissemination of television programs to the premises of subscribers over coaxial cable networks within the State of California. Respondents would

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[1]The court below found it unnecessary to determine this question. *Weaver v. Jordan*, 64 Adv. Cal. 243, 258, 411 P. 2d 289, 299 (1966).

present current motion pictures, sporting events, plays, educational programs and other special programs and attractions. Each subscriber will be required to pay a charge for the programs he chooses to view. Respondents will not transmit commercial advertising; their primary source of revenue will be the fees received from subscribers. [C. T. 3.][2]

Pertinent Provisions of the Act.

A crucial difference between the presently existing commercial television and subscription television is the method of collecting revenues: commercial television collects its revenues from advertisers; subscription television collects its revenues from subscribers. This difference provides the means by which the Act effectively prohibits subscription television (except in theatres).

The provisions of the Act which prohibit the conduct of subscription television businesses are contained in Sections 3 and 4. (Petition, Appendix A, p. 14.) Section 3 provides that the "public shall have the right to view any television program on a home television set free of charge" and that "no person shall, directly or indirectly, make a charge inconsistent with such right."

Section 4 provides that all executory contracts, agreements and understandings, "where inconsistent with such free transmission, are absolutely void and are not enforceable."

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[2]Clerk's Transcript on Appeal.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

1. THE DECISION OF THE CALIFORNIA SUPREME COURT WAS FOUNDED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court has consistently declined to review the decisions of state courts ruling on federal questions when it is clear the state court also predicated its decision upon an independent and adequate state ground. *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487 (1965); *City of New York v. Central Savings Bank,* 306 U.S. 661 (1939); *Fox Film Corp. v. Muller,* 296 U.S. 207 (1935). The rule is applied even though the state court did not separately analyze the effect of the state and federal constitutional provisions. *Jankovich v. Indiana Toll Road Commission, supra,* 379 U.S. at 489-492. As recently stated by this Court in *Mental Hygiene Dept. of Cal. v. Kirchner,* 380 U.S. 194 (1965):

> ". . . we would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the state constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. . . ." 380 U.S. at 198.

In *Jankovich v. Indiana Toll Road Commission,* this Court was faced with determining whether or not it should review a decision of the Indiana Supreme Court declaring unconstitutional an airport zoning ordinance. In its opinion, the Indiana Supreme Court stated that the issue was whether the ordinance was invalid under both the federal and Indiana constitutions. However in

resolving the issue, the Indiana Supreme Court did not analyze separately the effect of the two constitutional provisions but considered them together. This Court granted a writ of certiorari to review the lower court's decision and then reversed its decision and dismissed the writ as improvidently granted. It was held the Indiana Supreme Court's decision was based on an adequate and independent state ground:

> ". . . even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." 379 U.S. at 492.

The opinion below shows without question that the California Supreme Court intended to base its decision upon Article I, §9 of the California constitution separately and independently of the federal constitution.[3]

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[3]Article I, §9 provides in part:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Throughout this proceeding respondents have consistently relied upon Article I, §9 of the California constitution as a separate ground of decision. In their notice of motion for summary judgment the grounds set forth for invalidating the Act were that the Act was ". . . unconstitutional and invalid under both the United States and California Constitutions." [C. T. 36.]

In its judgment, the trial court expressly stated that the Act ". . . is invalid and unconstitutional because it abridges freedom of speech contrary to the provisions of the First and Fourteenth Amendments to the Constitution of the United States and of Section 9, Article 1, of the Constitution of the State of California." [C. T. 50.]

At the commencement of its opinion, the court states:

> "For reasons which will appear, we have concluded that the trial court correctly determined the Act to be invalid as an abridgment of the free speech guaranties of state and federal constitutions."

64 Adv. Cal. at 246; Petition, Appendix B, p. 17.

Throughout the opinion, the court cites and relies on California authorities. California authorities are cited for each proposition necessary to sustain the court's determination under Article I, §9. See 64 Adv. Cal. at 249-255; Petition, Appendix B, pp. 22-27.

The court concludes its opinion by "affirming" the trial court's judgment, after specifically reciting in the body of its opinion:

> "The trial court concluded that the Act abridges *both* the state and federal constitutional guarantees of free speech. (U.S. Const., Amendments I and XIV; Cal. Const., Art. I, §9)"

64 Adv. Cal. at 248-249; Petition, Appendix B, p. 21. (Emphasis added.)

The assertion by petitioner that the California Supreme Court "relied solely on the First and Fourteenth Amendments of the U.S. Constitution" is unfounded and wholly without merit. (Petition, p. 5.) This Court should not assume jurisdiction and review the decision below.

2. THE ACT ABRIDGES FREEDOM OF SPEECH AND PRESS; THE JUDGMENT BELOW IS IN ACCORDANCE WITH THE APPLICABLE DECISIONS OF THIS COURT.

The constitutional deficiencies of the Free Television Act are patent. The Act prohibits the conduct of a subscription television business in California and in so doing suppresses a medium of communication.

Specifically, the Act violates First Amendment rights on two separate and independent grounds. First, there is no clear or present danger of a substantive evil against which it protects. Second, under any set of facts advanced, the Act's prohibitions are much broader than necessary to cure the supposed "evils" at which it is directed, assuming they exist; its overly broad provisions cause the Act to violate the constitutional principle that a statute may restrict First Amendment rights only to the extent necessary to accomplish its legitimate objectives.

(a) The Act Does Not Protect the Public Interest Against a Clear and Present Danger.

Television is a form of communication protected by the First and Fourteenth Amendments. *Rumely v. United States,* 197 F. 2d 166, 177 (D.C. Cir. 1952); *American Broadcasting Co. v. United States,* 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd on other grounds,* 347 U.S. 284 (1954).

In order to escape invalidity under the First Amendment, the Act must protect the public against a clear and present danger of a substantive evil which the

state has a right to prohibit. *Schenck v. United States*, 249 U.S. 47, 52-53 (1919); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Bridges v. California*, 314 U.S. 252, 262-263 (1941). The fact that the Act was passed by a majority of the electorate is not material. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638-639 (1943).

(1) It Is Not Likely the Alleged "Evils" Will Occur.

The "evil" at which the Act supposedly is directed is that subscription television will destroy or seriously impair commercial television. (Petition, pp. 7-8.) Petitioner states that this conclusion may reasonably be drawn from "judicially noticeable facts" but no facts are set forth. (Petition, pp. 7-8.) Nor can any facts be stated at this time before the subscription television industry has had a chance to operate. Certainly there is nothing whatsoever to indicate that respondents' proposed business will cause the alleged "evil."[4]

The same arguments of the destructive effect of subscription television on commercial television were presented to the Federal Communications Commission when the Commission first considered the advisability

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[4]After studying subscription television systems, and specifically the system to be used by respondent, the California Assembly Interim Committee on Public Utilities and Corporations concluded:

> "There are no pay television concerns presently operating in the State of California. This committee believes that until experience is gained from actual operations it is impossible to determine the extent of and requirement for legislation. Any attempt to draft legislation at this time is, in the opinion of this committee, premature. Accordingly, it is the recommendation of this committee to take no action until such time as experience is forthcoming from actual operations."

Report of the Assembly Interim Committee on Public Utilities and Corporations Relative to Pay Television; Assembly Interim Committee Reports 1959-1961, Vol. 17, No. 7.

of authorizing the testing of a subscription television system. The arguments were rejected. The Commission found that there was not sufficient evidence to warrant the conclusion that subscription television would destroy or even materially impair commercial television.[5]

Not even the Act's statutory recitals, drafted by its proponents, justify the proscription of subscription television businesses. Three statutory "evils" are recited. First, it is stated that subscription television will have an "adverse effect" upon presently licensed television stations. But the Act does not recite what kind of an adverse effect or how much of an adverse effect will occur. Next, the Act states that subscription television "would tend" to deprive members of the public of their freedom of choice. The Act does not state, however, the extent of this tendency or what choice the viewing public will be deprived of. Finally, it is stated that subscription television would "tend to create a monopoly." Again, the word "tend" and again there is no attempt to define the extent of the tendency or to describe the monopoly. (Act, §2; Petition, Appendix A, p. 13.)

(2) The Occurrence of the Alleged "Evils" Is Not Imminent.

Subscription television is in its infancy. It is hardly in a position to seriously impair the commercial television industry now or in the immediate future, assuming it ever will have the capability of so doing.

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[5]See *Report on Hearings on Subscription Television, House Committee on Interstate and Foreign Commerce* (1958), pp. 39 (Findings 51-55) and 47. The Commission's decision was upheld in *Connecticut Committee Against Pay TV v. F.C.C.*, 301 F. 2d 835 (D.C. Cir. 1962), *cert. denied* 371 U.S. 816 (1962).

The physical limitations alone in building a closed circuit television system and obtaining subscribers indicate that it will take years to establish a substantial system.

(b) The Act Imposes an Overly Broad Ban on a Medium of Communication.

A separate and independent ground for invalidating the Act is that its prohibitions are much broader than conceivably necessary to accomplish the Act's declared purpose. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Saia v. New York*, 334 U.S. 558 (1948).

It is not necessary to prohibit the conduct of all subscription television businesses—or in particular, respondents' proposed business—to achieve the Act's supposed statutory objectives. Regulatory agencies can adequately supervise subscription television businesses so as to preserve for the public all of their benefits and at the same time cure or eliminate any practices which experience demonstrates are adverse to the public interest.

The Act does not attempt to distinguish among different sizes of subscription television businesses or to select the type of subscription television business which likely might have the ability to cause the supposed evils. The Act applies to *all* subscription television businesses, no matter how small they may be, how they are operated, when they are operated or where they are operated in the State of California.

(c) The Act Bears a Strong Presumption Against Its Validity.

The Act, by prohibiting the establishment of subscription systems, imposes a prior restraint on communication and the dissemination of speech and entertainment. It bears a strong presumption of unconstitutionality. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963); see also *United States v. C.I.O.,* 335 U.S. 106, 139-140 (1948).

(d) The Act Prohibits the Dissemination of Speech and Entertainment by Prohibiting Charging for Viewing Television Programs.

Petitioner and amicus Fox West Coast Theatres Corporation contend the Act does not prohibit the dissemination of speech but only a charge for viewing. They argue that respondents are free to use other media for transmitting the programs; thus there is no abridgment of expression. (Petition, pp. 6-7; amicus Fox West Coast Theatres Corporation brief, pp. 6-8.)

These arguments ignore the most important aspect of the Act, its effect. They also ignore the very basic concept that the First Amendment protects all forms of communication, not just a privileged few. *Associated Press v. United States,* 326 U.S. 1, 20 (1944) ("The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . Freedom to publish means freedom for all and not for some.").

It is the effect of a statute, not its form, by which it must be judged. *Near v. Minnesota,* 283 U.S. 697, 708 (1931); *Schneider v. Town of Irvington,* 308 U.S. 147, 161 (1939). The effect of the Free Television Act is to deprive subscription television businesses of their source of revenue and to prevent respondents from establishing a subscription television system and disseminating speech and entertainment over that system.

The Act's prohibitory effect upon subscription television is precisely the same as a statute, for example, prohibiting daily newspapers from charging customers for receiving papers.

In *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), this Court recognized the vice inherent in statutes such as we have here. The statute in *Grosjean* imposed a 2% tax upon the gross receipts of newspapers making a "charge" for advertising and having a circulation of over 20,000 copies per week. It was held that the statute was an unconstitutional abridgment of First Amendment rights. This Court reasoned that the statute "in the guise of a tax" had the effect of curtailing revenue and thus restricting circulation. As such, the effect of the statute was ". . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." 297 U.S. at 250.

If subscription television businesses cannot charge subscribers, their ability to present "box office attractions" to limited audiences is destroyed; their ability to present continuous programs without commercials is destroyed; their ability to use closed circuit systems with superior transmission qualities is foreclosed. In short,

the characteristics distinguishing subscription television from commercial television are destroyed.

The fact that other media of communication may be available to respondents (it is assumed) is completely beside the point. In most instances other media exist, yet that fact cannot justify the Act's prohibitions. See, *e.g., Saia v. New York,* 334 U.S. 558 (1948) (The fact that defendant could have used other media for political campaigning—*e.g.,* handbills or radio—did not justify the state's prohibiting the use of sound trucks for campaigning.).

(e) The First Amendment Protects Enterprises Engaged in Disseminating Information Irrespective of Whether They Are Conducted for Profit.

The fact that respondents intend to charge subscribers for viewing subscription television programs in no way diminishes the protection afforded by the First Amendment. See *New York Times v. Sullivan,* 376 U.S. 254, 266 (1964): *Burstyn v. Wilson,* 343 U.S. 495, 501-502 (1952).

3. THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE.

The equal protection clause of the Fourteenth Amendment requires that statutory discriminations be based on differences reasonably related to the purposes of the statutes in which they are found. *Morey v. Doud,* 354 U.S. 457 (1957).

The principal purpose of the Act is to preserve and further the viewing public's ability to enjoy television by promoting its "freedom of choice with respect to television programs." Act, §2; Petition, Appendix A, p.

13. It is the viewing public's ability freely to choose among varied and different kinds of programs which best serves its interests.

The Act discriminates against subscription television businesses generally, and respondents' proposed business in particular, in a major respect: it effectively forbids subscription television transmitted for viewing on "home television sets" but permits commercial television to transmit to such sets. Act, §§3 and 4; Petition, Appendix A, p. 14. This discrimination is not based on differences reasonably related to furthering the purpose of the Act. Subscription television will supplement commercial television. It will increase, not decrease, the number and type of programs available to the viewing public.[6] The effect of the Act, therefore, is to defeat its avowed purpose.

Another arbitrary and unjustified discrimination perpetrated by the Act is that it exempts by omission theatre television (*i.e.*, it prohibits charging only for viewing on "home television sets"). The only difference between theatre television and the system proposed by respondents is that the former charges each viewer for the privilege of watching television programs

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[6] *E.g.*, respondents would transmit first-run motion pictures. As the Federal Communications Commission found in authorizing the first experimental subscription television tests in Hartford, Connecticut, ". . . first-run feature films have not, with rare exceptions, been made available for television broadcasting. Nor is there any indication that they are likely to become available in the foreseeable future for free broadcasting. Thus, to the extent that first-run films might become a substantial feature of on-the-air [subscription television], transmissions they would provide a kind of entertainment not now generally available to the television audience." See *Report on Hearings on Subscription Television, House Committee on Interstate and Foreign Commerce* (1958), p. 31, Finding 50.

projected on theatre screens, while the latter charges only subscribers (no matter how many viewers) for observing programs transmitted to their home television sets. This difference does not justify the discrimination between these two methods of communication to the very obvious competitive advantage of theatre television businesses.[7] *Cf. Morey v. Doud*, 354 U.S. 457, 465-467, 469 (1957).

Conclusion.

The Petition for a Writ of Certiorari to the Supreme Court of California should be denied.

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[7]Theatre owners were the original proponents of the Act.